Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

No. 02-479

(3)

In The Supreme Court of the United States

MEDICAL BOARD OF CALIFORNIA,

Petitioner,

vs.

MICHAEL J. HASON,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

JOINT APPENDIX

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Petition For Certiorari Filed September 23, 2002
Certiorari Granted November 18, 2002

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32 pp

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U.S. District Court
Central District of California (Western Div.)

CIVIL DOCKET FOR CASE #: 99-CV-4264

Michael J Hason v. Med Bd of State CA, et al
[Note-Relevant entries only are included; abbreviations replaced with full words]

Filed: 04/21/99 Assigned to: Judge A. Howard Matz
Jury demand: Plaintiff Referred to: Magistrate Judge Robert N. Block

Demand: $9,999,000

DATE	DOCKET ENTRY
4/21/99	CIVIL RIGHTS COMPLAINT filed
4/21/99	NOTICE and ORDER of Reference to Magistrate Judge Margaret A. Nagle [Entry date 04/22/99]
8/31/99	NOTICE OF MOTION AND MOTION by defendant Med Bd of State CA, defendant Dept of Consumer to dismiss complaint; motion hearing set for 10:00 9/28/99 [Entry date 09/03/99]
10/4/99	MINUTES: resetting hearing on motion to dismiss to 10/26/99; plaintiff shall file and serve his opposition to motion on or Before 10-12-99; defendant State of CA shall file and serve its reply if any on or before 10-19-99 [Entry date 10/05/99]
10/12/99	OPPOSITION by plaintiff Michael J Hason to motion to dismiss [Entry date 10/15/99]
10/19/99	REPLY TO OPPOSITION by defendant State of California to motion to dismiss complaint [Entry date 10/20/99]

10/26/99 MINUTES: Re: defendant's motion to dismiss. The case is called. Audrey Egan, Deputy Atty General appears for defendant Medical Board of California. Plaintiff is not present. The court takes the matter under submission. [Entry date 10/26/99]

11/2/99 EX PARTE APPLICATION filed by plaintiff Michael J Hason to decide motion on papers. [Entry date 11/03/99]

11/4/99 MINUTES: denying ex parte motion to decide mot on papers the application however is DENIED to the extent that it seeks to have the court disregard defendant's reply or to grant plaintiff leave to file a sur-reply [Entry date 11/05/99]

2/1/00 REPORT AND RECOMMENDATION issued by Magistrate Judge Robert N. Block [Entry date 02/04/00]

2/2/00 NOTICE OF FILING REPORT AND RECOMMENDATION by Magistrate Judge Robert N. Block and Lodging of Proposed Judgment and Order [Entry date 02/04/00]

2/22/00 OPPOSITION by plaintiff Michael J Hason to Report and Recommendation [Entry date 02/24/00]

3/31/00 ORDER by Judge A. H. Matz adopting findings, conclusions and recommendations of United States Magistrate Judge [Entry date 04/03/00]

4/25/00 JUDGMENT: by Judge A. H. Matz. ADJUDGED that this action is dismissed w/o prejudice as to the individual defendants in their individual capacities and with prejudice as to the two named state agencies and the

individual defendants in their official capacities. terminating case [Entry date 04/27/00]

4/28/00 NOTICE OF APPEAL by plaintiff Michael J Hason to 9th C/A from Dist. Court order filed 3/31/00 [Entry date 05/01/00]

5/19/00 NOTIFICATION by Circuit Court of Appellate Docket Number appeal 00-55784 [Entry date 05/19/00]

General Docket
US Court of Appeals for the Ninth Circuit

Court of Appeals Docket #: 00-55784 Filed: 5/11/00
Other civil rights (Fed)
Hason v. Medical Board, et al, et al
Appeal from: Central District of California, Los Angeles

00-55784 Hason v. Medical Board, et al.
[Note – Relevant entries only are included; abbreviations replaced with full words]

5/11/00	DOCKETED CAUSE AND ENTERED APPEARANCE OF APLT IN PRO PER & COUNSEL FOR APPELLEES.
8/30/00	Filed original and 15 copies Appellant Michael J. Hason opening brief
10/12/00	Filed original and 15 copies appellee Medical Board
11/15/00	Filed original and 15 copies Michael J. Hason in reply brief
3/5/01	Filed order (Appellate Commissioner) Upon review of the record and the briefing in this appeal, this court has determined that the appointment of counsel in this appeal would benefit the court's review.. The clerk shall enter and order appointing pro bono counsel to represent appellant for purposes of this appeal only . . . The clerk shall establish a supplemental briefing schedule. The appeal is stayed pending further order.
4/16/01	Filed order – Pursuant to this court's 3/5/01 order appointing pro bono counsel for appellant, Erwin Chemerinsky, is hereby appointed to represent appellant in this appeal. This order shall be served on appellant as well as counsel for

appellee. Supplemental. briefing shall proceed as follows: appellant supplement brief is due 6/12/01; appellees supplemental. answer brief. is due 7/12/01 and appellant's optional reply brief. is due 7/26/01. This appeal shall be calendared for oral are in Pasadena on the next available calendar after briefing.

6/13/01 Received Appellant Michael J. Hason supplemental brief in

8/14/01 Filed original and 15 copies Appellee Medical Board supplemental brief

8/28/01 CALENDARED: PASADENA – Nov 6 2001 1:30 pm Courtroom 3

9/5/01 Filed original and 15 copies Michael J. Hason reply brief,

11/6/01 ARGUED AND SUBMITTED TO ALFRED T. GOODWIN, J. C. WALLACE, SIDNEY R. THOMAS

11/8/01 Filed Michael J. Hason additional citations, served on 11/7/01

2/12/02 FILED OPINION: REVERSED AND REMANDED (Terminated on the Merits after Oral Hearing; Reversed; Written, Signed, Published. Alfred T. GOODWIN, author; J. C. WALLACE; Sidney R. THOMAS.) FILED AND ENTERED JUDGMENT.

2/26/02 Received original and 50 copies Appellee Medical Board petition, for rehearing with suggestion for rehearing en banc, deficient: no cert of compliance, footnotes too small., served on 2/25/02 . Notified counsel.

3/4/02	Filed Medical Board motion to file late petition for rehearing/en banc. served 3/1/02
3/4/02	Received REPLACEMENT original and 50 copies Appellee Medical Board petition, for rehearing with suggestion for rehearing en banc
3/8/02	Filed order (Alfred T. GOODWIN,): The appellee's motion to file late petition for rehearing en banc is granted.
3/8/02	Filed original and 50 copies Appellee Medical Board petition for rehearing with suggestion for rehearing en banc 15 .pages,
3/18/02	Filed order (Alfred T. GOODWIN, J. C. WALLACE, Sidney R. THOMAS): The appellant is requested to file a response to the petition for rehearing en banc within 21 days of the date of this order. The response shall not exceed 15 pgs in length.
4/2/02	Received Appellant Michael J. Hason response to petition for en banc rehearing served on 4/1/02 Deficient: footnotes too small – notified counsel
4/10/02	Filed Appellant Michael J. Hason response opposing petition for en banc rehearing served on 4/9/02
6/26/02	Filed order (Alfred T. GOODWIN, J. C. WALLACE, Sidney R. THOMAS): The petition for rehearing en banc is denied.
7/5/02	MANDATE ISSUED

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

MICHAEL J. HASON, Plaintiff, v. MEDICAL BOARD OF THE STATE OF CALIFORNIA AND DEPARTMENT OF CONSUMER AFFAIRS, et al., Defendants.	CASE NO. **CV 99-04264 NM (MAN)** NOTICE OF HEARING; MOTION TO DISMISS COMPLAINT [F.R.C.P. Rule 12(b)(6)]; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF [REQUEST FOR JUDICIAL NOTICE FILED CONCURRENTLY HEREWITH] DATE: SEPTEMBER 28, 1999 TIME: 10:00 A.M. DEPT.: D (Filed Aug. 31, 1999)

TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on **September 28, 1999,** at **10:00 a.m.** or as soon thereafter as counsel may be heard in **Courtroom D** of the above-entitled court, located at **312 N. Spring Street, Los Angeles, CA 90012-4793**, Defendant State of California will move this court for an order under Federal Rules of Civil Procedure, Rule 12(b), dismissing the Complaint and each of the causes of action alleged therein as to Defendant State of California on the grounds that the Complaint fails to state any facts which would support any cognizable legal theory by which the State of California would be liable.

This motion is made following the conference of counsel pursuant to Local Rule 7.4.1. which took place by telephone on August 19, 1999.

This motion will be based on this motion and notice of motion, the memorandum of points and authorities filed in support thereof, on such oral and documentary evidence as shall be introduced at the time of the hearing, and on all papers and pleadings on file herein.

MOTION TO DISMISS

Defendant State of California moves to dismiss the Complaint on the following specific grounds:

1. In so far as the Complaint purports to state any causes of actions for constitutional deprivations, no cognizable interest recognized by a specific constitutional provision has been identified;

2. The State of California cannot be sued under 42 USC Section 1983 for damages; and

3. In so far as the Complaint purports to state any state law causes of action, such causes of action are barred by Plaintiff's failure to comply with claim presentations requirements set forth in *California Government Code* Sections 900 *et seq.*

WHEREFORE, Defendant State of California prays as follows:

1. That the Complaint and each claim for relief alleged therein be dismissed as against Defendant State of California;

2. That Plaintiff be ordered to take nothing from moving Defendant;

3. That judgment be entered in favor of moving Defendant; and

4. For such other relief as the court deems just.

Dated: August 31, 1999

Respectfully submitted,

BILL LOCKYER, Attorney General
of the State of California
AUDREY EGAN,
Deputy Attorney General

By: /s/ Audrey Egan
AUDREY EGAN

Attorneys for the State of California
(erroneously sued as The Medical
Board of the State of California and
Department of Consumer Affairs of
the State of California)

MEMORANDUM OF POINTS AND AUTHORITIES

PRELIMINARY STATEMENT

Plaintiff filed a lengthy Complaint naming as defendants the Medical Board of the State of California, the Department of Consumer Affairs of the State of California, and several State officers both individually and in their official capacities. The basis of the Complaint appears to arise from the State Medical Board's denial of Plaintiff's medical license based upon Plaintiff's mental illness.

The Complaint appears to attempt to allege constitutional violations, specifically, violations of the 14th Amendment equal protection clause and violations of the 14th Amendment due process clause as well as state law violations.

As set forth herein below, Plaintiff's Complaint fails to adequately allege any cognizable legal theories against moving Defendant.

ARGUMENT

I.

THE COMPLAINT FAILS TO ALLEGE THAT ANY COGNIZABLE CONSTITUTIONAL RIGHT WAS VIOLATED

In order to claim deprivation of a constitutional right, Plaintiff must identify a cognizable interest recognized by a specific constitutional provision was violated. *Baker v. McCollan* (1979) 443 US 137, 99 S.Ct 2689, 61 L.Ed2d 433 (detention for three days over New Year's weekend under facially valid arrest warrant does not constitute constitutional deprivation of liberty without due process); *Johnson*

v. Barker (9th Cir 1986) 799 F.2d 1396 (defamation resulting in damage to plaintiff's reputation alone, allegations of malicious prosecution, and mere negligent conduct do not rise to level of constitutional tort); *Daniels v. Williams* (1986) 474 US 327, 106 S.Ct 662, 88 L.Ed.2d 662 (prison official's negligent conduct causing unintended loss of or injury to life, liberty, or property does not implicate due process clause).

Plaintiff's Complaint makes general assertions of constitutional violations but fails to identify any cognizable interest recognized by a specific constitutional provision.

Plaintiff states that Defendants violated the 14th Amendment Equal Protection Clause but fails to show that he is within a protected class. Moreover, Plaintiff states in paragraphs 3 and 6 of his Complaint that the defendants proceeded under statutes including a statute that states that a license to practice medicine may be denied for the reason of mental illness.

The Complaint also alleges 14th Amendment due process violations. However, paragraph 1 of the Complaint states that Plaintiff appealed his license denial, there was a hearing, and later, Plaintiff petitioned for reconsideration. It appears from the Complaint that Plaintiff received due process. *Hudson v. Palmer* (1984) 468 US 517, 533, 104 S.Ct 3194, 3203, 82 L.Ed.2d 393, 407.

Other constitutional violations mentioned in the Complaint such as the 13th Amendment privileges and immunities clause and federal acts such as the Americans with Disabilities Act and the Rehabilitation Act similarly fail because they are insufficiently plead in the Complaint.

While the Complaint goes into detail about how Plaintiff believed he was wronged, it fails to identify what cognizable interest recognized by a specific constitutional provision was violated. Having failed to meet this threshold question, as to any purported federal claims, Plaintiff's Complaint fails to state any cognizable legal theory against moving Defendant.

II.

THE STATE OF CALIFORNIA CANNOT BE SUED UNDER 42 USC SECTION 1983 BECAUSE IT IS NOT A "PERSON" UNDER SUCH STATUTE

42 USC Section 1983 also called the federal Civil Rights Act of 1871, permits an individual to maintain a cause of action against a person acting under color of state law who violates the individual's constitutional or other federally protected rights. All of Plaintiff's alleged federal claims come under 42 USC Section 1983.

It is well settled that neither the State of California nor state officials sued in their official capacity can be sued under 42 USC Section 1983. The State and state officials are not considered persons within the meaning of 42 USC Section 1983. *Hafer v. Melo* (1991) 502 US ___, 112 S.Ct 358, 116 L.Ed.2d 301; *Will v. Michigan* (1989) 491 US 58, 109 S.Ct 2304, 105 L.Ed.2d 45.

Consequently, Plaintiff's alleged federal causes of action must fail as against moving Defendant.

III.

IN SO FAR AS THE COMPLAINT ALLEGES ANY STATE CAUSES OF ACTION, SUCH STATE CAUSES OF ACTION ARE BARRED BY PLAINTIFF'S FAILURE TO COMPLY WITH CLAIMS PRESENTATION REQUIREMENTS

It is well-established that before a complaint for damages can be filed against the State of California or against a state employee acting within the course and scope of employment, the plaintiff must first comply with specific claim presentation requirements set forth in *California Government Code* sections 900 *et seq*. The claim presentation requirement is a prerequisite to filing a lawsuit even when the lawsuit is filed in federal court. *California Government Code* section 945.4; *State ex rel Dep't of Trans. v. Superior Court* (1984) 159 Cal.App.3d 331, 338; *Mazzola v. Feinstein* (1984) 154 Cal.App.3d 305, 310; *Pacific Tel. & Tel. Co. v. County of Riverside* (1980) 106 Cal.App.3d 183, 188; *San Leandro Police Officers Ass'n v. City of San Leandro* (1976) 55 Cal.App.3d 553.

Plaintiff must file such claim within 6 months of accrual of his cause of action. *California Government Code* Section 911.2. According to the Complaint at paragraph 1, Plaintiff's cause of action accrued on April 24, 1998, at the very latest. To date, Plaintiff has not filed a claim. (See Request for Judicial; Notice filed concurrently herewith). The time in which Plaintiff could have filed a late claim application has also expired. *California Government Code* Section 911.4.

Plaintiff has not and cannot comply with claims presentation requirements. Therefore, Plaintiff is barred

from bringing any of these state causes of action against moving Defendant.

CONCLUSION

For the foregoing reasons, moving Defendant requests that its Motion to Dismiss be granted and that this case be dismissed in its entirety as to moving Defendant.

Dated: August 31, 1999

Respectfully submitted,

BILL LOCKYER, Attorney General
of the State of California
AUDREY EGAN,
Deputy Attorney General

By: /s/ Audrey Egan
AUDREY EGAN

Attorneys for the State of California (erroneously sued as The Medical Board of the State of California and Department of Consumer Affairs of the State of California)

[Declaration Of Service Omitted In Printing]

Michael J. Hason, M.D.
Plaintiff in pro per
1710 NW 87 Ave.
Plantation, FL 3322
(954) 424-4082

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

Michael J. Hason, M.D., Plaintiff in pro per. v. The Medical Board of the State of California; Dept. of Consumer Affairs of the State of California; Arlene Adams, the Director of the Dept. of Consumer Affairs of the State of California, Neil Fippin, Individually and as the Manager, Licensing Program of the Medical Board of the State of California; Melinda Acosta, Individually and as an official of the Medical Board of the State of California; Ron Joseph, individually and as Executive Director of the Medical Board of the State of California and as Director of the Dept. of Consumer Affairs of the State of California; Bruce Hasenkamp,	CV 99-04264 NM (MAN) Plaintiff's Opposition to State of California's Motion to Dismiss (Filed Oct. 12, 1999)

Individually and as President of the Division of Licensing of the Medical Board of the State of California; Dr. Ira Lubell, Individually and as Pres. of the Division of Medical Quality of the Medical Board of the State of California; Dr. Carole H. Horvitz, Dr. Anabel A. Imbert, Dr. Raquel D. Arias, Dr. [Illegible] D. Bertakis, Dr. Jack Bruner, Daniel Livingston, Karen McElliot, Dr. Alan E. Shumacher and Kip S. Skidmore, Individually and as Members of the Medical Board of the State of California's Division of Medical Quality; Dr. Thomas A. Joas, Karen McElliot and Bernard Alpert, Individually and as Officers of the Medical Board of the State of California and its Div. of Licensing Michael I. Sidley and Dr. Raja Toke, Individually and as Executives of the Medical Board of the State of California's Division of Licensing; the State of California; and Senior Investigator, Medical Board of California,

Defendants

AFFIDAVIT

1. I, Michael J. Hason, am the Plaintiff in the within action and am thoroughly familiar with the underlying facts mentioned below.

2. I applied for a medical license in about the Spring of 1995 and met with what I would describe as administrative resistance by the Medical Board of California (MB) to granting the application. After a long drawn out set of proceedings, post a Petition for Reconsideration, they finally denied the application in about April of 1998. Along the way the MB acted in ways that violated my rights under the Americans With Disabilities Act and other statutes and case law. Apparently, the State of California feels that it is the proper party to answer for the MB's acts.

3. The Plaintiff was a resident in Neurology at the VA Medical Center, W. Los Angeles, at the time he applied for a medical license to the MB. He had some difficulties during his medical training relating to the suffering of depression(s) which had caused him to resign from training program(s), so as to afford a complete respite and allow full recovery, before proceeding with any training. By the Plaintiff's application, the MB was alerted to this fact and immediately began aggressive inquiries. They requested a complete history of Plaintiff's problem with depression, despite the fact that Plaintiff had not suffered a serious depression since 1992. Although they were aware that records might date back to 1970, they requested all medical records, of an concerning the depression. They did not ask for summaries, they wanted everything, including doctor's notes covering periods greater than one year in the nature of weekly psychotherapy sessions where one inner and most private thoughts were probed, supposedly in a confidential setting. Plaintiff, though fearful of rejection by the MB, informed the MB he could not comply fully with their directive. Plaintiff did foolishly provide them

with more medical information than appropriate, but not everything. The MB then informed Plaintiff that he would be required to see their psychiatric consultant for a few hours, plus submit to some testing, if he could afford to pay them $2000.00. The testing was arranged to be done with one physician and then switched to a new one, a Dr. Michael Meek.

4. This Dr. Meek received amongst his materials orienting him to the case, (later seen by Plaintiff during discovery on administrative appeal), an MB internal memo by Chief Investigator Thornton, describing Dr. Hason as a "narcissistic jerk" and opining that the only way to block Plaintiff's right to a license would be to get him into a consultation exam. Further, they chose a biased physician, in that according to Meek's testimony at a later hearing, the MB had not paid him in the one case where he found the doctor-applicant safe to practice medicine, new to the practice of forensic medicine. Meek was also new to the practice of forensic psychiatry, but had an extensive history of involvement in government and political type matters in California.

5. That Meek was trying to help the MB block Dr. Hason's application for a license should have been obvious to Plaintiff, but Plaintiff proceeded in good faith. Meek's style was to try and get some dirt and then try to end off without getting any of the relevant circumstances that would explain how the dirt was really benign and not significant evidence for any pathology. Meek also administered a test to Plaintiff which was not appropriately geared to the setting and obtained releases for collateral releases, specific releases, with conditions. Meek then contacted different people, did not

contact anyone who he thought might be favorable to plaintiff and violated the conditions that limited the use of the releases. Meek then discussed matters, without a release with the interviewees and obtained or fabricated false and defamatory information about Plaintiff of a type prohibited to him by the ADA. He also fabricated an accusation against Dr. Hason regarding abandoning patients in 1994 while patient was a resident at SUNY Stony Brook and stated that James Davis, M.D., Chairman of the Neurology Dept. there had told him about it. Meek testified about the abandonment issue as well at the administrative hearing. Meek's also diagnosed Plaintiff as having a narcissistic personality disorder. This phony diagnosis was the linchpin of his phony argument that Dr. Hason would not be able to muster enough insight to act appropriately and get care if he should get depressed again. That diagnosis was described as "clinically reckless" by Dr. David Glaser, a psychiatrist well known to the MB and its attorney. He is held in the highest regard by them and is a member of their panel of psychiatric experts.

6. The Plaintiff's application was initially denied in Aug. of 1996 under a statute that gave as its basis "mental illness." Of course, the MB would have to pay attention to such a condition, but the statute was overbroad, especially as applied to Plaintiff and did not reflect any consideration of the restraints imposed by the ADA and the equal rights clauses. The MB then took its time about issuing a Statement of Issues, delivered same about Dec. of 1996. That Statement's recital of the MB's case was fraudulent and insufficient in law, in that it basically argued that Dr. Hason would not act appropriately in he became depressed. The Board then

delayed the proceedings by refusing to provide a hearing until about May 1997.

7. In the Interim, under great stress, including but not limited to financial stress, the false and abusive report issued by Meek which was seen via discovery, the cruel accusation of mental illness in the denial document of Aug. 1996, Dr. Hason fell ill with depression. He was forced to move to Florida in May 1997 and was in recovery when he attended his hearing in Sept. of 1997. The MB, at the hearing, continued to push points that any basic investigation would prove false, including the patient abandonment issue and the bogus narcissistic personality diagnosis, intentionally confusing the Administrative Law Judge, Jaime Roman (ALJ).

The ALJ, stated that the case was difficult for him, that he like Plaintiff, but he felt that Plaintiff needed to continue therapy (Plaintiff had been in therapy only three months at the time of the hearing), presumably for at least six months as argued by Dr. Meek and reapply for a license thereafter. Although the subject of the restraints of the ADA was raised during the hearing, briefly, the ALJ made no determination that the danger to the public safety that he identified rose to the level required by the ADA, nor did he discuss whether it would be reasonable or not for the MB to accommodate Dr. Hason by directing him to remain in therapy and/or directing to work under some form of supervision or reportage to an MB appointed monitor.

8. After further extensive delay, the MB served the decision of the ALJ and Plaintiff wrote a Petition for Reconsideration. Plaintiff's points regarding the applicability of the ADA, the introduction of false data by

Meek such as the patient abandonment issue were not heeded. The Petition was denied after a cursory review by MB's attorney, despite the fact that Plaintiff had successfully completed a therapeutic course and a rehabilitation during more than six months in outpatient treatment. The treating physician and psychotherapist in Florida stated unequivocally that Dr. Hason's depression had lifted, that he had excellent insight into his entire medical problem, that he was compliant and that he had no narcissistic or other personality disorder.

9. The Plaintiff is an individual protected by the ADA because he is disabled with a susceptibility to depression which when it occurs acutely causes Plaintiff difficulties with accomplishing major life activities such as working effectively. The position of the MB in denying Plaintiff's application for a license would be consistent with placing Plaintiff in that class of individuals. The MB and/or the State of California is a covered government entity under Title II of the ADA. The Plaintiff attempted to file an administrative claim under the ADA against the MB and other defendants, but was correctly informed by the EEOC that they could not accept same and that it was not a prerequisite to litigation in the courts. Plaintiff had appeared to complain at the EEOC office prior to the running of 180 days after the final denial of Plaintiff's application for a license, post the administrative hearing, which Order by the MB became effective in about April 1998.

WHEREFORE, the Plaintiff requests that this Court deny the motion to dismiss by the State of California of any claims made under the ADA and/or other claims made and notices given in the Complaint and

permit the Plaintiff the amend same, if necessary, to meet the minimal acceptable standards of pleading in this Court and to grant further relief just in the premises.

Sworn to before me on Oct. 10, 1999 under penalties of perjury at Plantation, FL

/s/ Glen Lindenfeld
Notary

/s/ Michael J. Hason, M.D.
Plaintiff, in pro per

Notary Public GLEN LINDENFELD
State of Florida
My Comm. Exp: 10/22/99
Comm#: CC503899

POINTS AND AUTHORITIES

I. THE STATE OF CALIFORNIA IS LIABLE TO PLAINTIFF BECAUSE IT VIOLATED HIS RIGHTS UNDER THE AMERICANS WITH DISABILITIES ACT.

1. The Defendant The State of California (SC) has appeared in this action and has claimed that service against the Medical Board of the State of California (MB) and/or the Dept of Consumer Affairs were mistaken. The SC implies that they are the proper entity to be sued if either the state agency or department officials have violated Plaintiff's rights under the Americans With Disabilities Act (ADA) or the Rehabilitation Act (federal statutes). The Defendant SC then makes a blanket statement in their motion papers that any violation of the ADA is improperly pleaded, but they do not elaborate at all and so the Plaintiff must request

leave to re-plead this cause of action, if a deficiency is identified. Amending of the Complaint would be appropriate as Plaintiff can cite numerous arguable violations of these civil rights statutes made by officials of the MB and its agents. The Plaintiff can identify the specific constitutional rights that have been violated, but this identification is not necessary, as the federal statutes violated reformulate the protection of these rights under the authority of Congress to legislate consistent with the mandates of the Constitution. The Plaintiff, additionally, is disabled and that class pursuant to the decision of Congress and the Courts is an identifiable class worthy of protection under the equal protection clause of the 14th Amendment and any other relevant Constitutional provisions.

2. Plaintiff's attached affidavit specifies some of the violations of his ADA rights by the agents of the MB and is adopted here as if set forth more fully. These subclaims make out at least the minimum of facts that were or could be pleaded against Defendant and satisfy the rules at the pleading stage and resist a motion to dismiss for failure to state a claim.

3. Direct reliance on certain Constitutional provisions such as the Privileges and Immunities Clauses are potentially barred by the 11th Amendment as far as the Defendant SC is concerned. They are not protected, however, from the reaches of the ADA, which presumably was enacted to further and encourage the proper administration of law and justice under the 14th Amendment. It has been held that if Congress chooses to makes its laws applicable to States, when proceeding in a 14th Amendment manner, it has the power to do so. It has been held that States or their licensing agencies are

entities governed by the ADA and it has been held that the 11th Amendment is not a bar to an action under the ADA. This result is not altered by a recent 9th Circuit decision holding that Title II does not cover employment cases. In that case, the Plaintiff should have exhausted his administrative remedies appropriately before filing his federal case. In the within action, a filing with the EEOC would be not correct, and the EEOC properly refused to accept such a filing from the Plaintiff although he appeared before them in less than 180 days after the MB denied his application for a medical license. This follows from the dictates of Title II of the ADA. Cf. *Zimmerman v. Oregon Dept. of Justice*, 170 F.3d 1169 (9th Cir. March 18, 1999)

4. The Plaintiff, Michael J. Hason, has alleged that he is protected by the ADA. This is true, because he is disabled in the following sense. He has suffered recurring depressions that have at times significantly impaired his ability to function in major activities of life. The MB took the position that the disability was of a nature to preclude licensure as a physician, presumably because of a combination of danger to the public and a non-stated determination that any reasonable accommodation would not alter their conclusion.

5. It is possible that the Plaintiff has not clearly pled the elements of his ADA claim with sufficient clarity so far, although many of the underlying facts and considerations were included in the Complaint. The SC had more than adequate notice of the factors that would go into a properly pleaded ADA cause of action under the circumstances of this case and amendment, if needed, rather than dismissal, would be the appropriate next step in these proceedings.

IN CONCLUSION

The Plaintiff requests that the motion to dismiss of the State of California be denied in relation to the ADA and/or any claims supported by other laws and facts noticed by the language of the Complaint and that the Plaintiff be allowed to amend his Complaint, if needed to meet minimum pleading requirements and that this Court grant any further relief justified in the premises

Dated: Oct. 10, 1999 at
Plantation, FL

/s/ Michael Hason
Michael J. Hason, M.D.
Plaintiff, in pro per

[Affidavit Of Service Omitted In Printing]

BILL LOCKYER, Attorney General
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Attorneys for the State of California (erroneously sued as The Medical Board of the State of California and Department of Consumer Affairs of the State of California)

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

MICHAEL J. HASON, Plaintiff, v. MEDICAL BOARD OF THE STATE OF CALIFORNIA AND DEPARTMENT OF CONSUMER AFFAIRS, et al., Defendants.	CASE NO. **CV 99-04264 NM (MAN)** DEFENDANT STATE OF CALIFORNIA'S REPLY TO PLAINTIFF'S OPPOSITION TO ITS MOTION TO DISMISS THE COMPLAINT DATE: OCTOBER 26, 1999 TIME: 10:00 A.M. DEPT.: D

TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD:

Defendant State of California (erroneously sued as The Medical Board of the State of California and Department of

Consumer Affairs of the State of California) replies to Plaintiff's Opposition to its Motion to Dismiss the Complaint as follows:

Plaintiff appears to concede that all causes of action in his Complaint should rightfully be dismissed except for his alleged violation of his rights under the Americans With Disabilities Act ("ADA"). For the following reasons, Plaintiff's ADA claim should be dismissed along with all other claims and Plaintiff should not be allowed to amend his Complaint.

I.

PLAINTIFF CANNOT STATE A VALID ADA CLAIM BECAUSE HE IS NOT A "QUALIFIED INDIVIDUAL" FOR PURPOSES OF THE ADA

The ADA provides that:

> No qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity. 42 U.S.C. Section 12132(2).

However, a "qualified individual with a disability" is defined, in pertinent part, as:

> An individual with a disability who, with or without reasonable modifications to rules, policies or practices . . . meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity. 42 U.S.C. Section 12131(2).

Even if, for purposes of argument, the State Medical Board's refusal to issue Plaintiff a medical license could be considered to be a "service" denied to Plaintiff or a "program or activity" from which Plaintiff was excluded, Plaintiff could not bring a valid ADA claim because he is *not* a "qualified individual" as defined by the ADA.

In *Alexander v. Margolis* 921 F.Supp. 482 (1995) the state medical board revoked and refused to reinstate the medical license of a former physician who suffered from a bipolar disorder. The plaintiff sued for, amongst other things, violation of the ADA. The court found that the plaintiff was not a qualified individual with a disability under the ADA and dismissed the entire complaint. The court opined as follows:

> The very nature of the police powers exercised by state boards of medicine require the state to discriminate on the basis of, amongst other considerations, a mental condition harmful to the public's safety. By the very nature of the practice of medicine, given the physician's necessary independence to "practice" his art, no reasonable modification can be made to a policy of restricting medical practice to those without evidence of mental disabilities . . . The Board cannot exercise its duty without the discretion to consider the impact of a mental disability upon one's ability to practice with reasonable skill and safety. The danger of irreparable harm to the public is too great to deny the Board such discretion. To require otherwise would be unreasonable. (at pg. 488).

Alexander v. Margolis 921 F.Supp. 482 (1995) is essentially the same as our present case. Plaintiff's application for a medical license was denied because of his

mental illness, which, as set forth in the Complaint, had been diagnosed as a narcissistic personality disorder. Plaintiff states in his Complaint that Defendants denied his license application pursuant to statutes. The State Medical Board has a duty to deny medical licenses to applicants that it believes will pose a danger to the public.

Plaintiff, because of his mental condition, is not a qualified individual under the ADA and therefore, cannot sue for alleged ADA violations. Consequently, Plaintiff's ADA cause of action should be dismissed. Plaintiff should not be permitted to amend this cause of action because he cannot amend his Complaint so as to state a viable ADA cause of action.

II.

LEAVE TO AMEND THE COMPLAINT SHOULD NOT BE GRANTED BECAUSE PLAINTIFF CANNOT AMEND HIS COMPLAINT TO STATE VIABLE CAUSES OF ACTION

As to Plaintiff's allegations of constitutional violations, even if Plaintiff could state cognizable constitutional violations in his Complaint, Defendant is entitled to quasi-judicial immunity because the Medical Board was acting as a tribunal performing a judicial function. *Watts v. Burkhart, M.D.* 978 F.2d 269, 275 (1992) (quoting *Burns v. Reed,* 500 US 478, 490; 111 S.Ct. 1934, 1941; 114 L.Ed.2d 547 (1991)). Moreover, Defendant would also be entitled to qualified immunity because its actions consisted of government officials performing discretionary functions whose conduct did not violate any clearly established statutory or constitutional right. *Harlow v. Fitzgerald*, 457 U.S. 800, 818; 102 S.Ct. 2727, 2738; 73 L.Ed.2d 396 (1982).

Concerning Plaintiff's state causes of action, Plaintiff concedes that he failed to file a proper State board of Control claim and is therefore precluded from bringing any state causes of action against Defendant.

Consequently, Plaintiff should not be granted leave to amend his Complaint.

CONCLUSION

For-the foregoing reasons, Defendant asks that its Motion to Dismiss be granted, that Plaintiff be denied leave to amend his Complaint, and that the entire Complaint be dismissed against Defendant with Prejudice.

Dated: October 15, 1999

Respectfully submitted,

BILL LOCKYER,
Attorney General
of the State of California
AUDREY EGAN,
Deputy Attorney General
By: /s/ Audrey Egan
AUDREY EGAN

Attorneys for the State of California (erroneously sued as The Medical Board of the State of California and Department of Consumer Affairs of the State of California)

[Declaration Of Service Omitted In Printing]